IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

THOMSON REUTERS ENTERPRISE)
CENTRE GMBH and WEST PUBLISHING	
CORPORATION,)
) C.A. No. 20-613-SB
Plaintiffs/Counterdefendants,)
) JURY TRIAL DEMANDED
V.)
ROSS INTELLIGENCE INC.,) PUBLIC VERSION
)
Defendants/Counterclaimant.)

DEFENDANT/COUNTERCLAIMANT ROSS INTELLIGENCE INC.'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE CERTAIN TESTIMONY, ARGUMENT, OR EVIDENCE REGARDING THE OPINIONS OF DR. ALAN COX

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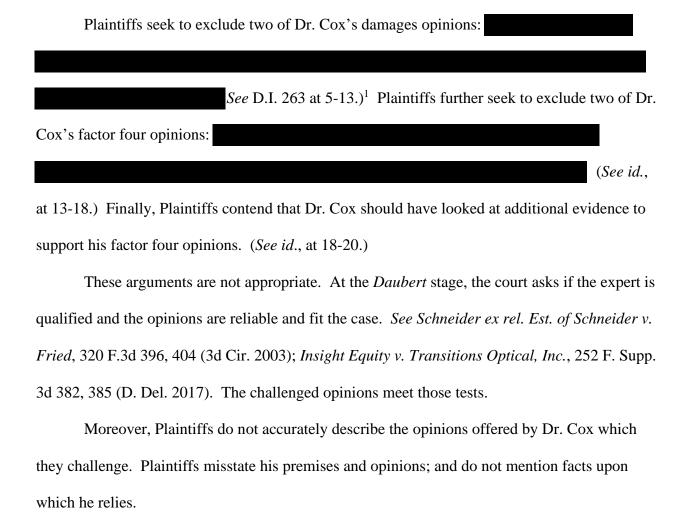
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INTRODUCTION AND SUMMARY OF ARGUMENT



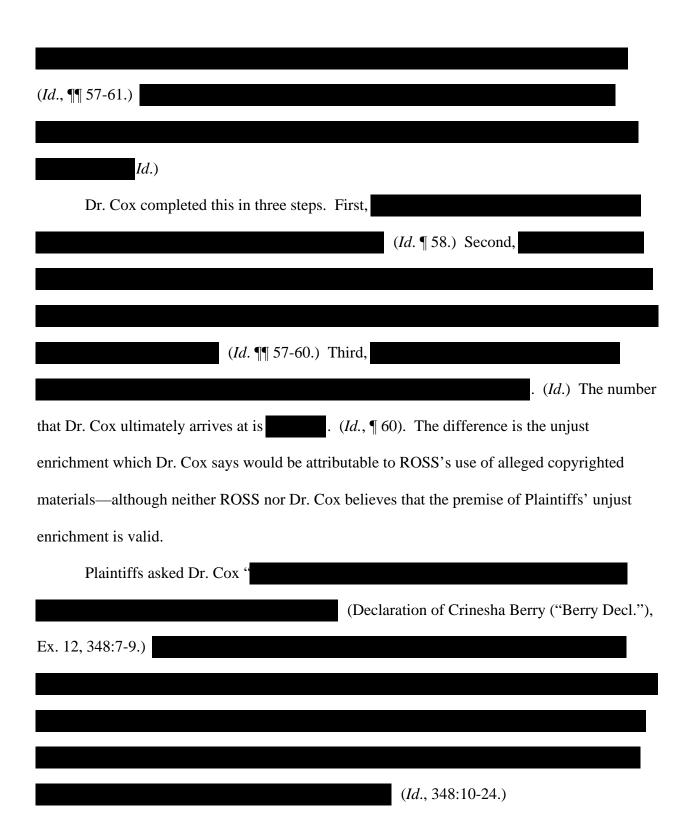
For these reasons Plaintiffs' motion should be denied.

FACTUAL BACKGROUND

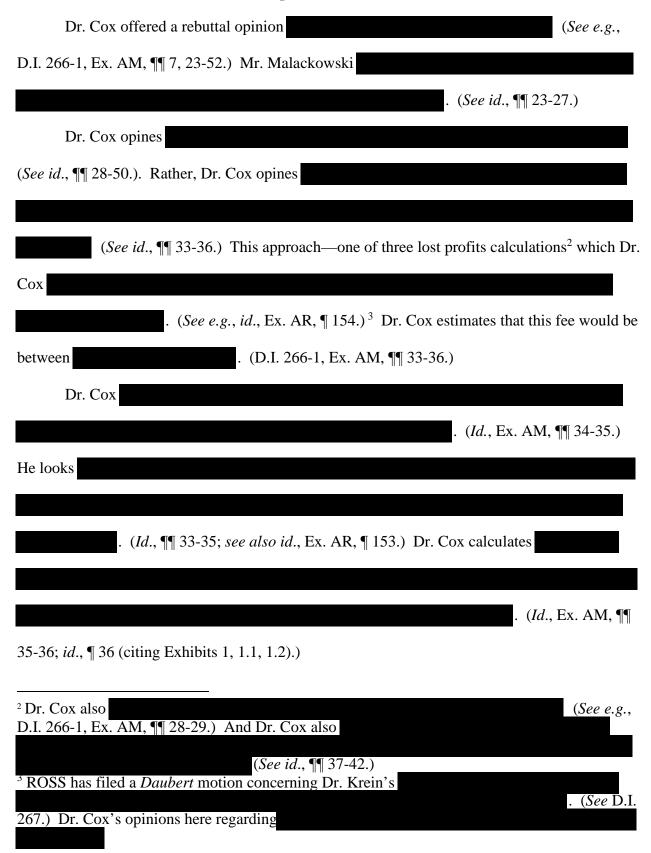
A. Dr. Cox's Estimate of ROSS's Unjust Enrichment Opinions

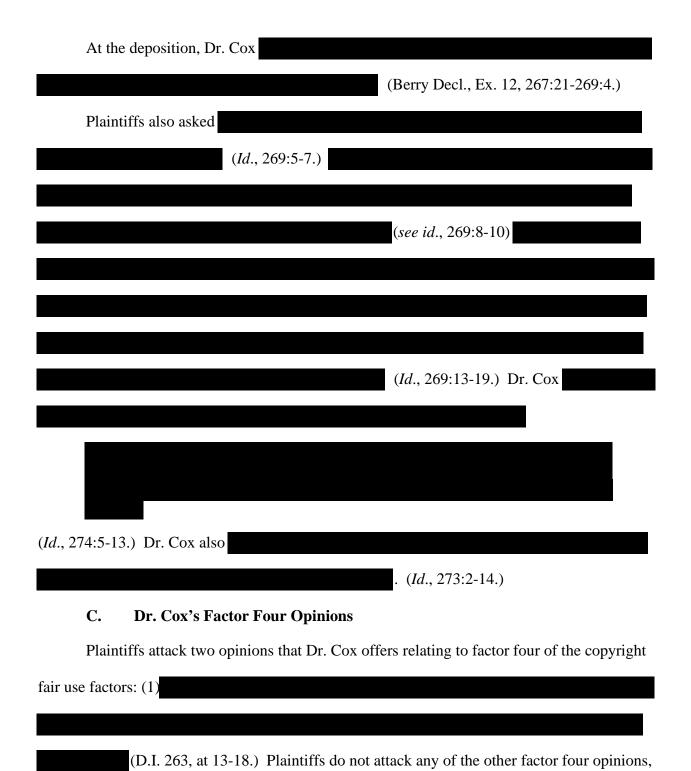
Plaintiffs' expert (D.I. 266-1, Ex. AM, ¶ 54.) That date is July 2018. (*Id.*) Dr. Cox (*Id.*, ¶¶ 54-60.)

¹ These estimates relate to the alleged copyright violation. Plaintiffs do not attack Dr. Cox's estimates related to Plaintiffs' tortious interference claim. (*See* D.I. 266-1, Ex. AM, ¶¶ 90-92.)



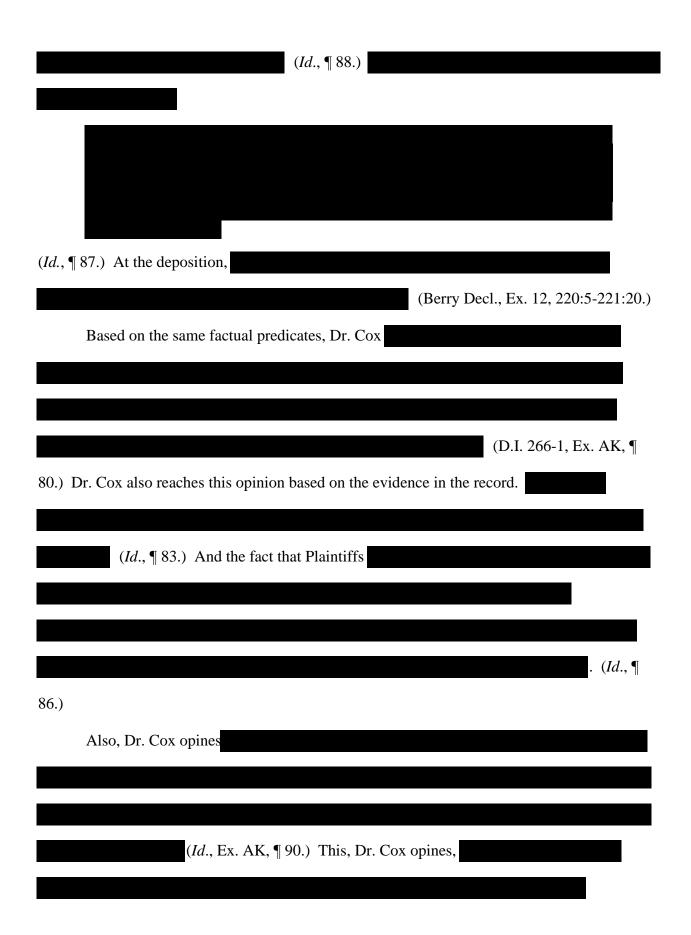
B. Dr. Cox's Lost Profits Opinions

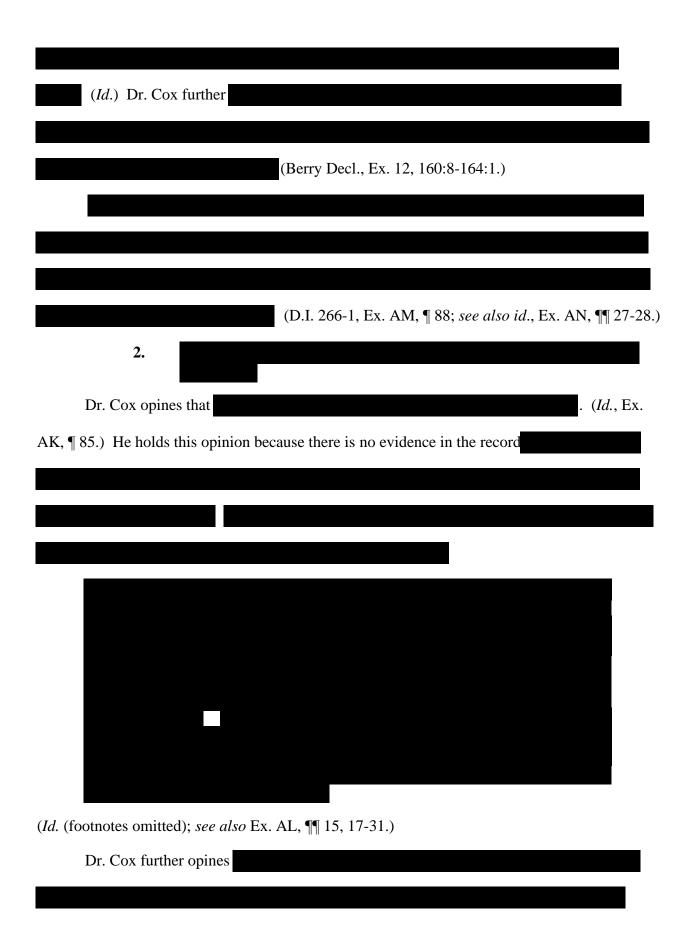


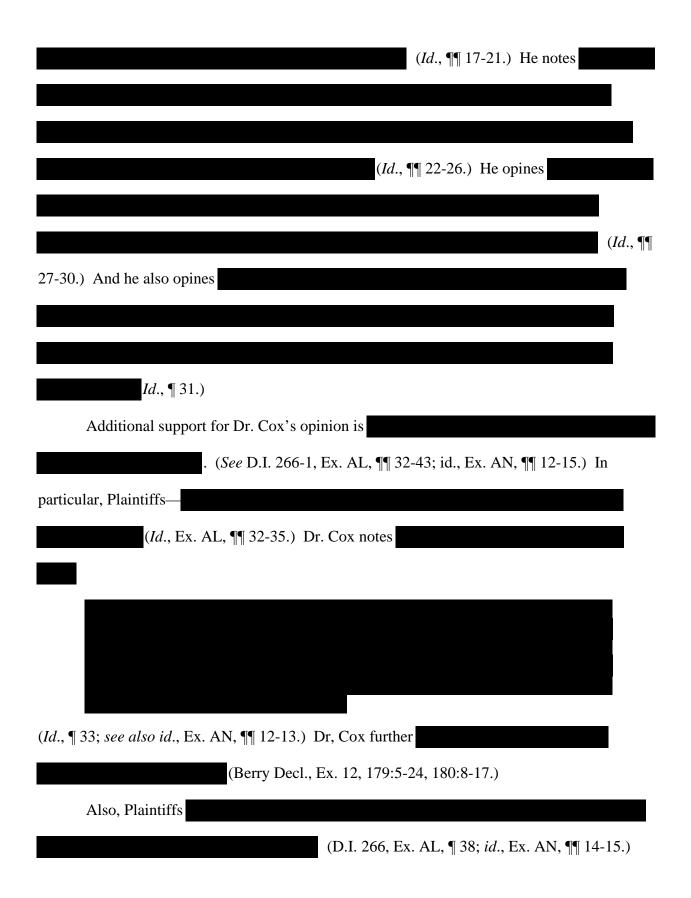


but instead criticize Dr. Cox for not looking at certain evidence to reach his opinions. (*Id.*, at 18-20.)⁴

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1.
       Through his investigation, Dr. Cox learned that
                                                      (D.I. 266-1, Ex. AK, ¶¶ 18, 53-60, 65-79.)
While Plaintiffs use Westlaw Content
                                                                                (Id., \P 67.) The
information that Dr. Cox surveyed for this proposition is stated in his reports. (Id., Ex. AK, ¶¶
19, 26-29, 36-41, 68-72; Ex. AL, ¶ 16; Ex. AM, ¶ 8; Ex. AN, ¶ 9.)
                                                                              . (See e.g., Berry
Decl., Ex. 12, 70:19-71:1.)
       Given the differences between the two platforms, Dr. Cox
          (D.I. 266-1, Ex. AK, ¶¶ 86-87.)
<sup>4</sup> The other factor four opinions are: (
                                                 (D.I. 266-1, Ex. AK, ¶¶ 56-60; 68-79); (4)
                 (D.I. 266-1, Ex. AK, ¶¶ 86-88); (5)
                                                                          (D.I. 266-1, Ex. AK,
¶¶ 80-83, 86); (6)
              (D.I. 266-1, Ex. AN, \P 23-31; Ex. AK, \P 90, , 92-96 & n. 153); and (7)
                                                     (D.I. 266-1, Ex. AL, ¶¶ 32-43; Ex. AN, ¶¶
12-15.)
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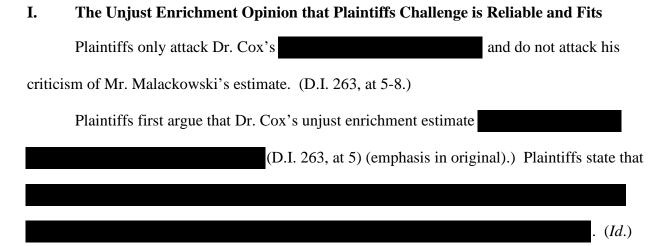
LEGAL STANDARD

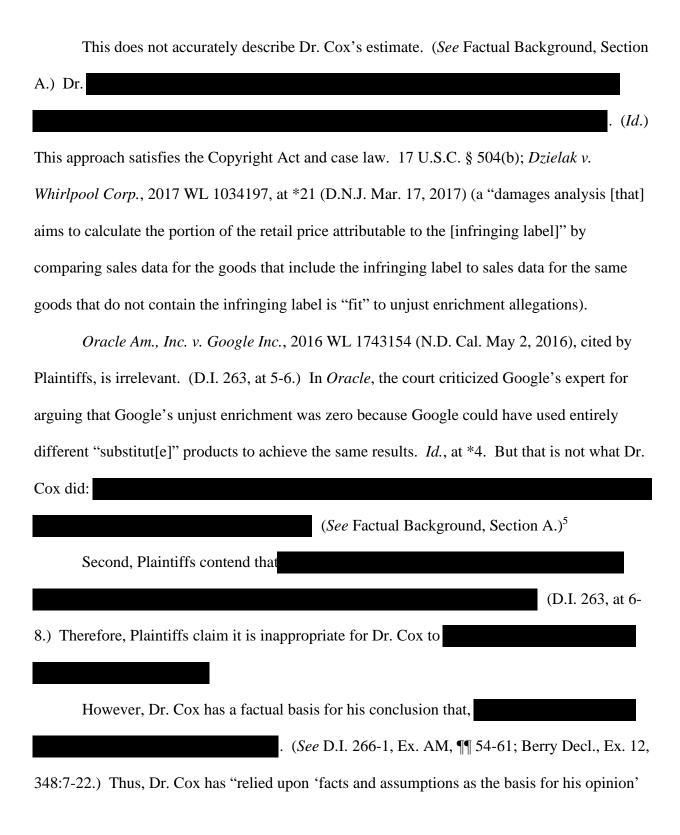
Daubert has "a 'trilogy' of requirements: (1) qualification, (2) reliability, and (3) fit." Insight Equity, 252 F. Supp. 3d at 385 (quoting Schneider, 320 F.3d at 404.) Plaintiffs do not challenge Dr. Cox's qualifications. (See D.I. 263.)

"An expert's testimony is admissible so long as the process or technique the expert used in formulating the opinion is reliable." *Insight Equity*, 252 F. Supp. 3d at 386 (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (3d Cir. 1994)). "Reliability does not require certainty." *Id.* (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993).) Also, "the Third Circuit has warned that 'the reliability requirement must not be used as a tool by which the court excludes all questionably reliable evidence." *Id.* (quoting *Paoli*, 35 F.3d at 744.) Instead, an opinion is reliable if it "is founded on good grounds, not perfect ones." *Id.*

"[F]it asks whether the proffered testimony is sufficiently helpful." *Id.* It follows the principle that "expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.* (citing *Daubert*, 509 U.S. at 591.) "The same liberalness in evaluating reliability applies in evaluating fit" and the Third Circuit "emphasize[s] that the standard is not that high." *Insight Equity*, 252 F. Supp. 3d at 386 (citation omitted.)

ARGUMENT

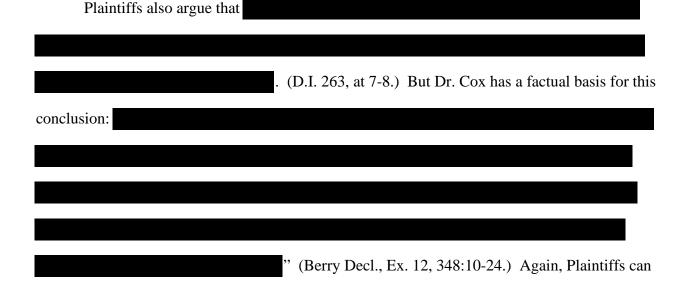




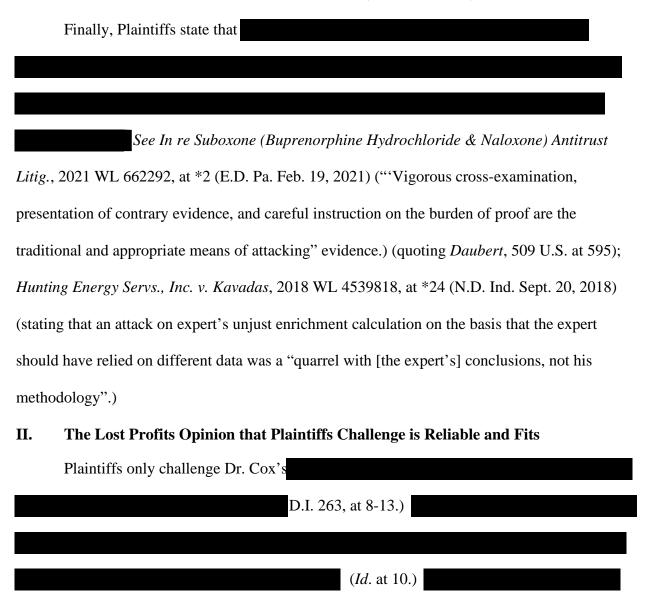
⁵ For the same reason, *Comput. Assocs Int'l, Inc. v. Altai, Inc.*, 775 F. Supp. 544 (E.D.N.Y. 1991), is irrelevant. (D.I. 263, at 6.) Dr. Cox does not propose a "hypothetical, infringement-free world" with his unjust enrichment estimate. *See Altai, Inc.*, 775 F. Supp. at 571.

and [Plaintiffs] 'can highlight those weaknesses' if any 'through effective cross-examination." In re Mushroom Direct Purchaser Antitrust Litig., 2015 WL 5767415, at *10 (E.D. Pa. July 29, 2015); Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408, 414-15 (3d Cir. 2002); see also Dzielak, 2017 WL 1034197, at *11 (noting that "[t]he defendants remain free to argue that [the expert] manipulated his data to produce a more plausible result" but "[t]he issue now, however, is not one of the opinion's ultimate persuasiveness, but of its admissibility."); Jama v. Esmor Corr. Servs., 2007 WL 1847385, at *27 (D.N.J. June 25, 2007) ("The Supreme Court in Daubert has stated that the focus of the inquiry should be solely on principles and methodology, not on the conclusions that they generate.") (citing Daubert, 509 U.S. at 596).

Plaintiffs cite *MOSAID Techs. Inc. v. LSI Corp.*, 2014 WL 807877, at *2 (D. Del. Feb. 28, 2014) and *ZF Meritor*, *LLC v. Eaton Corp.*, 696 F.3d 254, 292 (3d Cir. 2012), as a basis for the argument. (D.I. 263, at 6-7.) In both, the courts rejected an expert's estimate premised on a business plan's hypothetical business projection that the expert did "not independently verif[y]." *See MOSAID*, 2014 WL 807877, at *2; *Meritor*, 696 F.3d at 292. This is not what Dr. Cox did.



attack this factual proposition which Dr. Cox relies on for his opinion "through effective cross-examination." *Mushroom*, 2015 WL 5767415, at *10 (citation omitted).⁶



(Factual Background, Section A.)

⁶ Pure Earth, Inc.v. Call is also irrelevant. (D.I. 263, at 8.) In that case, the court held that the expert could not opine that stock was overvalued because the expert's method failed to account for causation between the facts he relied on and changes in stock price. (See Pure Earth, 2011 WL 13380381, at *2-3 (E.D. Pa. Nov. 14, 2011).). But Dr. Cox offers sufficient evidence of "causal factors." (Id., at *3.) In particular:

(*Id.*, at 10-12.) (emphasis omitted.)

This is another argument challenging the credibility of Dr. Cox's evidence. "The amount of damages may be demonstrated with reasonable certainty, so long as the evidence is not based upon speculation or guess work." *ID Sec. Sys. Canada, Inc. v. Checkpoint Sys., Inc.*, 198 F. Supp. 2d 598, 613 (E.D. Pa. 2002) (citing *In re Lower Lake Erie Iron Ore Antitrust Lit.*, 998 F.2d 1144, 1176 (3d Cir. 1993).)

Background, Section B.) Indeed, as explained *supra*,

. (*Id.*)

. (*Id.*)

. (*Id.*)

. In *M2M Sols. LLC v. Enfora, Inc.*, the court excluded damages testimony because it found that the expert gave only "nebulous" and "ambiguous conclusions of technology compatibility . . . without any rationale other than undisclosed conversations" with another

⁷ It bears emphasizing, too, that Dr. Cox (Factual Background, Section C.2.)

Moreover, "[e]ven if the data relied on by the expert is imperfect, and more (or different) data might have resulted in a better or more accurate estimate in the absolute sense, it is not the district court's role under *Daubert* to evaluate the correctness of facts underlying an expert's testimony." *Hartle v. FirstEnergy Generation Corp.*, 2014 WL 1317702, at *9 (W.D. Pa. Mar. 31, 2014).

expert. 167 F. Supp. 3d 665, 677 (D. Del. 2016). Dr. Cox's estimate does not share these issues. (*See* Factual Background, Section B.)

Dash v. Mayweather is inapposite, as the court noted that the expert "expressly conceded that he had not analyzed comparable works [and] he also emphasized the differences between" the copyrights at-issue and benchmark work. 731 F.3d 303, 320 (4th Cir. 2013). Dr. Cox does not make a similar concession. (See Factual Background, Section B.) Notably, Dash also states that lost profits need not "rely on precisely comparable works" and that estimates should be accepted as long as they are not "based on 'undue speculation." Id. (citing 17 U.S.C. § 504(b).)

Country Rd. Music, Inc. v. MP3.com, Inc., is also off-point. The court criticized the expert for "disregard[ing] critical differences" between the facts of the case and the benchmark license, including "the term of use . . . exclusivity . . . the breadth of the license . . . and the nature of the business." 279 F. Supp. 2d 325, 331 (S.D.N.Y. 2003).

are not

as significant as those identified in *Country Rd*. (See Factual Background, Section B.)

And *Baker v. Urban Outfitters, Inc*, is also inapplicable. The court stated that the expert "engaged in [an] 'apples and oranges' comparison" because her "starting point for calculating damages" was her own "fee for a commissioned shoot," whereas the case involved license fees for stock works. 254 F. Supp. 2d 346, 354 (S.D.N.Y. 2003).

(See Factual Background, Section

B.)8

⁸ *Trell v. Marlee Elecs. Corp.*, is inapposite because the Federal Circuit is ruling on the District Court's calculation of a damage award—a different posture than this *Daubert* motion. *See* 912 F.2d 1443, 1446-47 (Fed. Cir. 1990).

Instead, the caselaw shows that Dr. Cox can

See Mushroom, 2015 WL

5767415, at *13 (an expert "does not need to utilize the best data set imaginable to satisfy the reliability standard under Rule 702"); *UHS of Delaware, Inc. v. United Health Servs., Inc.*, 2017 WL 1928341, at *1 (M.D. Pa. May 10, 2017) ("the basis for an expert opinion 'does not have to be perfect") (citation omitted)).⁹

. (D.I. 263, at 12-13.)

(Berry Decl., Ex. 12, 267:21-268:6.)

See United States v. Rite

Aid Corp., 2020 WL 3970201, at *11 (E.D. Cal. July 14, 2020) (accepting a methodology where the expert takes "a simple random sample" from a nonoverlapping population, and citing additional authority for this approach); *In re Blood Reagents Antitrust Litig.*, 2015 WL 6123211, at *19 (E.D. Pa. Oct. 19, 2015) (the "use of averaging" can be a "reliable" method for measuring

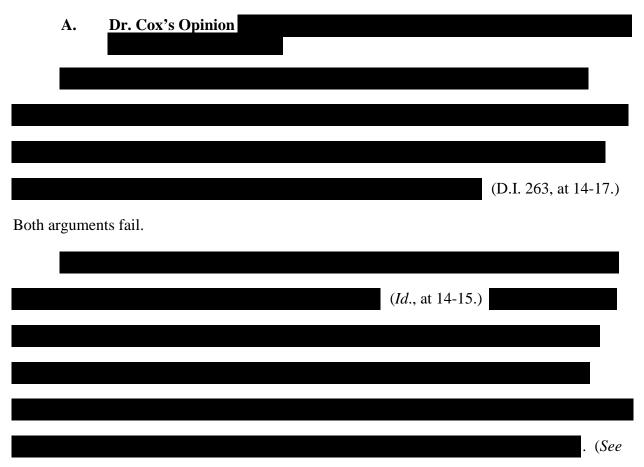
. (D.I. 263, at

⁹ Plaintiffs also introduce a number of exhibits to argue

^{10-12.)} This is not the right time for this. Presumably, Plaintiffs could have done this fully at Dr. Cox's deposition. *See In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 2021 WL 662292, at *2; *Sensor Sys. LLC v. Blue Barn Holdings, Inc.*, 2021 WL 1686829, at *3 (M.D. Fla. Apr. 29, 2021) ("Plaintiffs have identified many variables that factor into [the expert's] opinions with which they disagree. However, their disagreement is not a basis for finding [the] opinions to be unreliable. Instead, their arguments go to the weight, rather than the admissibility, of [the] opinions, and Plaintiffs can challenge his opinions through vigorous cross-examination").

characteristics of a common collection); *Lloyd v. Conseco Fin. Corp.*, 2001 WL 36097624, at *9 (C.D. Cal. Oct. 19, 2001) ("analysis of the average length of time loan originators remained employed at" financial corporation was reliable method for understanding characteristics about the class of loan originators). Plaintiffs can challenge Dr. Cox's decision to use this method at trial. *See e.g.*, *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997) ("Challenges to survey methodology go to the weight given the survey, not its admissibility.").

III. The Two Factor Four Opinions that Plaintiffs Challenge are Reliable and Fit

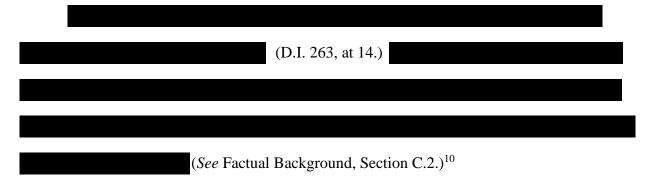


Factual Background, Section C.2.) He also supported this conclusion at his deposition. (Id.)

There is no need for Dr. Cox to go through all of the steps if it is not needed to draw his conclusion. Courts often recognize that economists are properly situated to analyze market characteristics and from there draw expert conclusions. *Int'l Constr. Prod., LLC v. Caterpillar*

Inc., 2022 WL 4465376, at *25 (D. Del. Sept. 26, 2022) (citing In re Processed Egg Prods.

Antitrust Litig., 81 F. Supp. 3d 412, 422 (E.D. Pa. 2015) (rejecting Daubert challenge and noting, "[t]he field of economics contains a field of study on the features of markets that make them particularly conducive to collusion, and [the expert witness] appears to be drawing from that field in his report."); Processed Eggs, 81 F. Supp, 3d at 423 (the economic expertise "is applying those principles to the factual record and rendering an opinion").



Finally, Plaintiffs' criticism of Dr. Cox's research process is misplaced. His research reinforces his conclusions from the record and from Plaintiffs' own witnesses that no such market exists. (*See id.*)

e.g., Mushroom, 2015 WL 5767415, at *6 (noting that the reliability standard is "not that high" and that "[t]his is particularly true regarding the testimony in this case because economics and statistics 'require the use of professional judgment, [so] expert testimony [in those fields] is less

(D.I. 263, at 16.) As Dr. Cox noted,

(D.I. 266-1, Ex., AL ¶ 40.) In any event,

See

none of these are actually *Daubert* arguments, as they go to the credibility of Dr. Cox's opinions.

¹⁰ For the same reason,

likely to be excluded because challenges may ultimately be viewed as matters in which reasonable experts may differ.") (citation omitted).¹¹

B. Dr. Cox's is Reliable and Fit

Plaintiffs state that Dr. Cox's "rankly speculates" to opine that Plaintiffs' economic welfare would improve if ROSS remained in the market. (D.I. 263, at 17-18.) However, this is not speculation at all—Dr. Cox relied on facts that he investigated about Westlaw, ROSS, and Plaintiffs, as well as his expertise on how market forces operate, to reach this conclusion. (*See* Factual Background, Section C.1.) The proposition that ROSS cites no materials to support his opinions is wrong. (*Id.*) And Plaintiffs' introduction of countervailing factual evidence just shows that these are challenges to Dr. Cox's credibility, not the admissibility of his opinions. Even "seemingly contradictory" facts are not a basis to exclude on *Daubert* but rather goes to weight. *Ingevity Corp. v. BASF Corp.*, 2021 WL 3510664, at *2 (D. Del. Aug. 10, 2021).

IV. Dr. Cox's Factor Four Opinions Rely on Sufficient Evidence to Satisfy *Daubert*Finally,

. (D.I. 263, at 18.) However,

(See Factual Background, Section C.1; see also Berry Decl., Ex. 12, 70:19-71:1.) Moreover, Plaintiffs ignore all of the other support that Dr. Cox relies on to draw his conclusions—

¹¹ Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000), Furlan v. Schindler Elevator Corp., 864 F. Supp. 2d 291 (E.D. Pa. 2012), and Oddi v. Ford Motor Co., 234 F.3d 136 (3d Cir. 2000) do not change anything. (See D.I. 263, at 15-16.) The courts in those cases complain that the expert's method could not be ascertained or replicated. That is not true of Dr. Cox's opinions. (See Factual Background, Section C.2.)

Factual Background, Section C.)

evidence is not grounds for exclusion. *See Processed Egg*, 81 F. Supp. 3d at 425 (stating that because "[t]he briefing and arguments have not revealed that [the expert's] failure to include certain facts in his analysis was so egregious as to make his methodology unreliable[,]" the "contention goes to the weight of [the expert's] testimony, not its admissibility."); *In re BlackRock Mut. Funds Advisory Fee Litig.*, 2019 WL 1387450, at *24 (D.N.J. Feb. 8, 2019) ("an expert opinion is not inadmissible because it may contain flaws, nor is it excludable because it provides testimony regarding only one facet or aspect of an action but does not prove the whole case; such vulnerabilities affect the weight of the testimony, not its admissibility."); *Sensor Sys. LLC v. Blue Barn Holdings, Inc.*, 2021 WL 1686829, at *3 (M.D. Fla. Apr. 29, 2021) ("Plaintiffs can question [the expert] as to how his failure to consider [potentially relevant financial data] affects his calculations, but this is not a basis for excluding his opinions."). ¹²

CONCLUSION

For the foregoing reasons, ROSS respectfully requests that the Court deny the motion.

¹² None of the cases Plaintiffs cite in this section are on-point. *See McAndrew v. Garlock Equip. Co.*, 537 F. Supp. 2d 731, 735 (M.D. Pa. 2008) (not related to a damages expert); *Coates v. Metro. Prop. & Cas. Ins. Co.*, 2022 WL 3928387, at *8 (E.D. Pa. Aug. 30, 2022) (same); *Rhoads Indus., Inc. v. Shoreline Found., Inc.*, 2022 WL 4021766, at *22 (E.D. Pa. Sept. 2, 2022) (same).

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